Workplace Safety and Insurance Appeals Tribunal

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Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Ontario

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Quarterly Production and Activity Report

October 1 to December 31, 2012

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Production Summary

At the end of the fourth quarter 2012, the active inventory totaled 5,597 appeals. This is approximately 4% higher than the active inventory at the end of the third quarter 2012.

Incoming Appeals

Incoming appeals numbered 1,298; of these, 1,214 were appeals from WSIB decisions, and 84 appellants advised they were ready to proceed to hearing following a period of inactive status.

This compares to 1,129 new appeals and 117 reactivated appeals recorded in the third quarter of 2012.

In the 4th quarter of 2011, the Tribunal recorded 1,105 new appeals and 107 reactivations.

In 2011, the weekly average of hearing-ready appellants was 62. For Q4-2012, the weekly average of hearing-ready appellants is 68. This figure excludes cases reactivated from inactive status.

Dispositions

Dispositions in the fourth quarter of 2012 totaled 1,019. This includes 342 dispositions in the pre-hearing areas resulting from dispute-resolution (ADR) efforts, and 677 after-hearing dispositions; of the after-hearing dispositions, 650 followed from Tribunal decisions.

Inactive Inventory

At the end of Q4-2012, the inactive inventory was 2,522 cases (at the end of Q3-2012, the inactive inventory was 2,501 cases).

In Q4-2012, 88% of final decisions were released within 120 days. In 2011, 86% of final decisions were released within 120 days.

The Notice of Appeal Process

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the fourth quarter of 2012, the notice inventory included 1,595 dormant cases, the active inventory totalled 5,597 cases, and the inactive inventory totaled 2,522 cases.

Production Tables and Charts

A. Active Inventory End of Quarter

Period	Active Inventory
Q1-2011	3887
Q2-2011	4009
Q3-2011	4195
Q4-2011	4428
Q1-2012	4897
Q2-2012	5188
Q3-2012	5382
Q4-2012	5597

B. Incoming Appeals

Period	Incoming Appeals
Q1-2011	1108
Q2-2011	1083
Q3-2011	1160
Q4-2011	1212
Q1-2012	1355
Q2-2012	1298
Q3-2012	1246
Q4-2012	1298

C. Dispositions

Period	Dispositions – Total	Pre-hearing	After Hearing
Q1-2011	993	287	706
Q2-2011	994	309	685
Q3-2011	906	300	606
Q4-2011	937	312	625
Q1-2012	930	287	643
Q2-2012	1005	341	664
Q3-2012	956	343	613
Q4-2012	1019	342	677

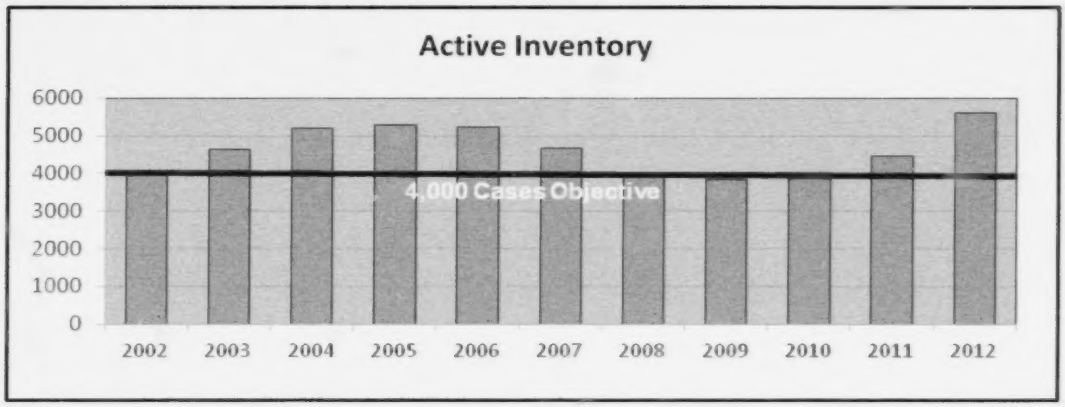
D. Inactive Inventory

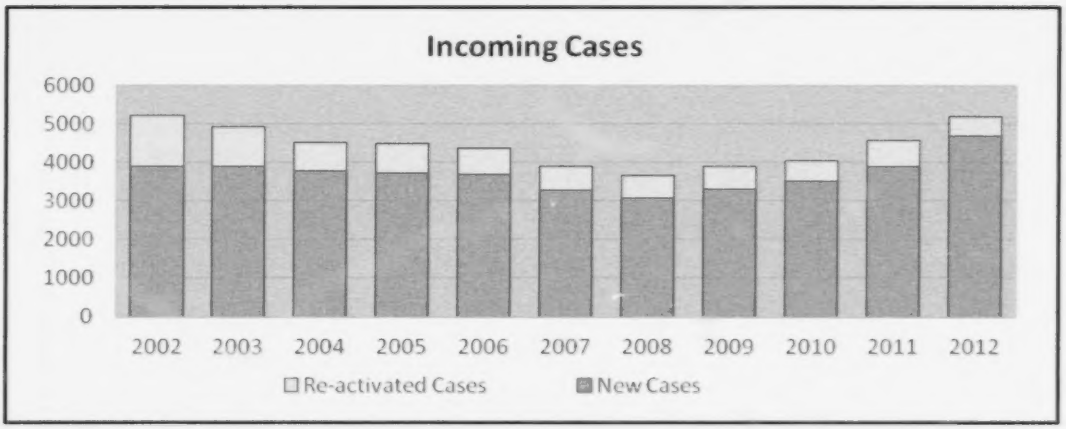
Period	Inactive Inventory
Q1-2011	2963
Q2-2011	2810
Q3-2011	2746
Q4-2011	2705
Q1-2012	2569
Q2-2012	2515
Q3-2012	2501
Q4-2012	2522

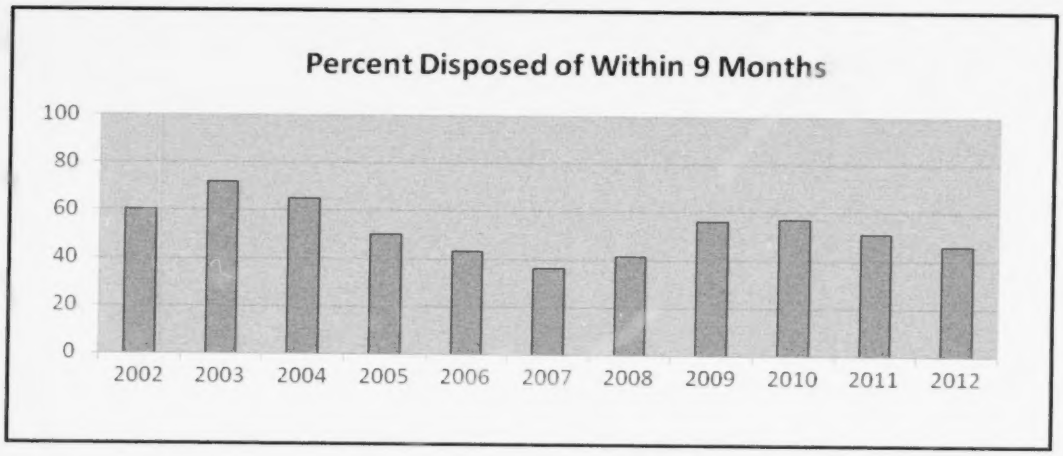
E. Notice of Appeal (Dormant cases)

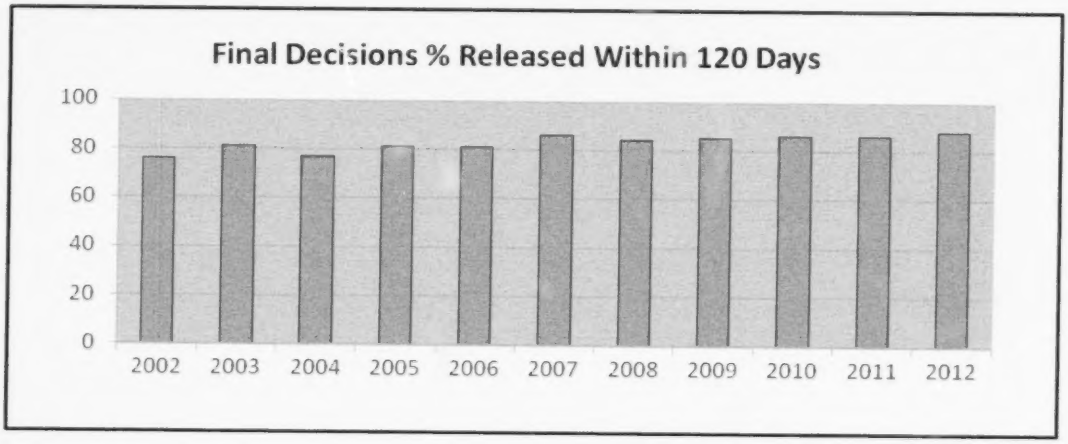
Period	Total Dormant	Change from Previous Quarter
Q1-2011	1400	83
Q2-2011	1367	-33
Q3-2011	1435	68
Q4-2011	1477	42
Q1-2012	1433	-44
Q2-2012	1435	2
Q3-2012	1531	96
Q4-2012	1595	64

F. Production Charts: From 2002 to 2012






Percent Disposed of Within 9 Months
100
80
60
40
20
0
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012


Final Decisions % Released Within 120 Days
100
80
60
40
20
0
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012

Judicial Review Activity

The status of applications for judicial review involving the Tribunal for the fourth quarter of 2012 is set out below. Only those judicial reviews where there was some significant activity during the quarter are listed. Most applications for judicial review are handled by General Counsel and the lawyers in the Tribunal Counsel Office.

1. *Decisions Nos. 3164/00* (December 18, 2000), *3164/00R* (March 28, 2001), and *3164/00R2* (March 6, 2012)

The worker worked in a donut shop. She injured her back in 1994. She was paid total benefits for about a month, then returned to work, and went off again for a further seven months. In September 1997, she was fired. In October 1997, she was granted entitlement for a right elbow disability arising out of her job duties.

The worker appealed for entitlement for Future Economic Loss benefits (a FEL) and further vocational rehabilitation (VR) arising out of the back injury. She also appealed ongoing entitlement for a right elbow condition. Finally, she appealed for entitlement for fibromyalgia, which she alleged arose out of either the back or the elbow injury.

In *Decision No. 3164/00*, released in December 2000, the Vice-Chair granted entitlement to a FEL and VR assistance for the back injury. The Vice-Chair denied entitlement for fibromyalgia and the right arm/elbow.

On the first reconsideration, the worker submitted additional medical documentation in support of her claim for fibromyalgia; however, the Vice-Chair found it was insufficient to warrant re-opening the appeal. The worker made five more reconsideration requests, which the Tribunal Chair found did not meet the threshold to be assigned for review by another Panel or Vice-Chair.

In January of 2011, the worker retained new counsel and commenced an application for judicial review. The Tribunal expressed concern about the timeliness of this application, which was commenced 10 years after the Tribunal's initial decision. In May 2011, the worker's counsel asked if the Tribunal would consent to adjourn the judicial review while the worker pursued a seventh reconsideration. The Tribunal agreed.

In *Decision No. 3164/00R2*, released on March 6, 2012, a different Vice-Chair denied a further application for reconsideration. In this instance, the Vice-Chair was also not persuaded by the additional medical evidence. He noted that the evidence submitted in support of the reconsideration was actually "reply" evidence, obtained in an attempt to refute the Tribunal's conclusion, rather than new evidence. Further, he did not find the additional evidence demonstrated that the original decision should be reconsidered.

The worker decided to proceed with the judicial review. The Tribunal served a supplementary record, and the worker and the Tribunal filed their factums. The Tribunal also brought a motion to dismiss the judicial review for delay. The motion and judicial review were scheduled to be heard on December 5, 2012.

The Divisional Court Panel of Justices Aston, Hackland and Lederer unanimously granted the Tribunal's motion to dismiss for delay. The Court noted that the judicial review was commenced 18 years after the initial injury, 15 years after the second injury, and 10 years after the Tribunal's original decision. There was a three-year gap between

the Tribunal's sixth reconsideration and the commencement of the judicial review. In exercising its discretion, the Court took into account the length of the delay, the lack of a reasonable explanation for the delay, and the prejudice suffered by the delay due to the destruction of the hearing tapes and the integrity of the process.

Just prior to the end of the year, the worker filed a notice of application for leave to appeal the Divisional Court's decision.

2. *Decisions Nos. 1791/07* (August 28, 2007), *1791/07R* (March 3, 2008) and *1791/07R2* (September 21, 2009)

The worker, a kitchen helper, injured his neck in November 2004. He was granted Loss of Earnings (LOE) benefits from May 9, 2005 until the end of 2010. Entitlement was extended to include his low back, shoulders, and chronic pain disability. The worker was also granted a 45% Non-Economic Loss (NEL) award for chronic pain.

The worker appealed the denial of entitlement for carpal tunnel syndrome, entitlement for a psychotraumatic disability, and the amount of a NEL award for chronic pain. The Tribunal held that the worker had no entitlement for carpal tunnel syndrome, that he was not entitled to a psychotraumatic award, and that he was not entitled to an increase in his NEL award.

The worker commenced an application for judicial review. The Tribunal served and filed its Record, and was in the process of preparing its factum when it was noted that the worker's counsel had referred to evidence in his factum that was not before the Tribunal. After discussions with the worker's counsel, it was agreed that this judicial review would be put on hold while the worker pursued a further reconsideration.

The further reconsideration was denied by *Decision No.1791/07R2* (September 21, 2009).

The worker revived his application for judicial review. The application was heard in June 2010 by a Divisional Court Panel comprised of Justices Herold, Jennings and Lederman. At the outset of the hearing, the worker's lawyer abandoned the application in respect of the psychotraumatic disability award. The Court unanimously dismissed the application in respect of entitlement to benefits for carpal tunnel syndrome.

Although the time to seek leave to appeal a decision of the Divisional Court is 15 days, over eight months later the worker brought a motion to extend the time to seek leave to appeal to the Court of Appeal. The Tribunal opposed the extension.

On March 30, 2011, Karakatsanis J.A. (as she then was) denied the time extension. She noted there was no evidence the Applicant had formed the intent to seek leave to appeal within 15 days, the delay here was significant, the Applicant's allegations about illness and being unable to find counsel were unsubstantiated and not compelling, there would be prejudice to the Tribunal if an extension was granted, and in any event there was no merit to the appeal.

Over a year later, the worker then asked the Supreme Court to review the decision of Karakatsanis J. The Supreme Court Registrar was of the view that there was no final order of the Court of Appeal and that the Supreme Court therefore had no jurisdiction. He suggested that the worker's recourse was go back to the Court of Appeal to try to

have the order of Karakatsanis J. reviewed by a three-member Panel of the Court of Appeal. However, when the worker went back to the Court of Appeal, he was out of time to ask for such a review and so had to ask the Court of Appeal to extend the time in which to ask a three-member Panel of the Court of Appeal to review the order of Karakatsanis J. The Tribunal opposed the worker's time extension request and filed a factum.

On July 12, 2012, the Court of Appeal dismissed the worker's time extension request. Justice Laskin noted that the Court of Appeal's Rules require that motions for review be brought within four days of the challenged decision. He set out the factors to be considered in deciding motions to extend time. He found that, even excusing the worker's error in initially bringing his matter to the Supreme Court, he did not bring his motion to the Supreme Court until 12 months after Karakatsanis J.A.'s decision. Justice Laskin found that, in light of the absence of prejudice to the Tribunal, he would be inclined to discount the importance of the lengthy unexplained delay if he saw any merit in the worker's proposed appeal. However he found no merit in his appeal, even assuming that the worker would be allowed to revive the claim for psychotraumatic disability that he abandoned before the Divisional Court. Justice Laskin noted that the Tribunal considered all of the medical evidence. The Tribunal simply reached a different conclusion on the medical evidence from the conclusion for which the worker argues. Justice Laskin found that the submission that the Tribunal's decisions are unreasonable is not even arguable.

The worker then brought a motion before a panel of three judges to review Justice Laskin's order. The Tribunal opposed the motion and filed a factum.

On September 26, 2012, the Court of Appeal (MacPherson, Blair and Armstrong) dismissed the worker's motion, with costs to the Tribunal fixed at $500. In brief reasons, the Court stated that it agreed with Laskin J.A.'s analysis and order, and also agreed with Karakatsanis J.A.'s underlying decision.

The worker then brought an application to the Supreme Court of Canada, seeking leave to appeal the September 26, 2012 decision of the Court of Appeal. At the end of the quarter, the decision of the Supreme Court of Canada was pending.

3. *Decision No. 2484/11* (February 15, 2012)

The worker injured her wrist at work in 2006. She then stopped work in 2007 when she was diagnosed with tenosynovitis in the same wrist. She appealed entitlement to LOE benefits from September 2007 to February 2008, and from March 2008. The Vice-Chair allowed the worker's appeal in part, finding she was entitled to full LOE benefits from September 2007 to October 2007, but not after that date.

However, the Vice-Chair also found on the evidence that the worker had failed to accept suitable work offered by the employer. Even though the worker was subsequently granted entitlement under the chronic pain policy, the Vice-Chair found this did not mean she was incapable of performing the work offered.

The worker commenced a reconsideration application, and then withdrew it to start an application for judicial review. The worker argues that she was entitled to notice of the consequences of her refusal to accept modified work, in accordance with insurance

principles. The Applicant has filed her factum, and at the end of the quarter the Tribunal was preparing its responding factum.

4. *Decisions Nos. 2175/10* (November 9, 2010) and *2175/10R* (July 5, 2011)

The worker appealed for initial entitlement for injuries to both knees. The employer claimed the worker had knee problems when the worker was hired, that the worker did not report the injury, and that his knee problems were not related to work. After hearing testimony from a number of witnesses and reviewing the medical evidence, the Vice-Chair denied the appeal. She found significant discrepancies about the date of the accident, whether the accident was reported, and the nature of the injuries.

The worker has commenced an application for judicial review. The worker filed an affidavit with his factum, to which the Tribunal has objected. At the end of the quarter, the Tribunal was preparing a responding factum. It is expected that this judicial review will be heard early in 2013.

5. *Decisions Nos. 512/06I* (May 12, 2006) and *512/06* (November 2, 2011)

The worker injured his back in 2001, when he was 63 years of age. The Board paid the worker LOE until May 31, 2002, when the worker turned 65, which was also the mandatory retirement date of the employer.

The worker appealed to the Tribunal for LOE benefits after May 31, 2002 for his back, and also for benefits for a right shoulder injury. In *Decision No. 512/06I*, a single Vice-Chair denied the appeal for the worker's right shoulder, but granted the worker entitlement to LOE benefits from May 31, 2002 until February 5, 2003 (which was two years after the injury), pursuant to s.43(1)(c) of the *Workplace Safety and Insurance Act* (WSIA).

The worker then alleged that limiting entitlement to LOE to two years post-injury for those workers over age 63 contravened section 15(1) of the *Canadian Charter of Rights & Freedoms* (Charter).

The Ontario Attorney General participated in the Tribunal hearing. The Office of the Worker Adviser (OWA) and the Office of the Employer Adviser (OEA) were invited to participate as interveners. The OWA accepted, and became co-counsel with the worker's representative. The OEA withdrew from the appeal.

The hearing reconvened with a full Panel to consider the Charter issue. The majority of the Panel found there was no breach of the Charter. The Vice-Chair dissented and found there was a breach of section 15 of the Charter.

The majority considered the historical context of workers' compensation law, the background to the dual award scheme, and the evidence of expert witnesses. It found the workplace insurance plan operates primarily as an insurance scheme, rather than a social benefits program.

The majority characterized the test for whether the Act violates s.15 of the Charter to be (a) if the Act creates a distinction based on an enumerated ground, and (b) if there is a distinction, whether it is discriminatory in that it perpetuates disadvantage or stereotyping. The worker alleged there was a discriminatory distinction based on age.

The majority agreed that there was a distinction on an enumerated ground, but did not agree that the distinction perpetuated disadvantage or stereotyping.

The majority noted there had been no Charter decision in a Canadian court which had successfully challenged the termination of benefits at age 65, that age 65 is still when most people retire, and that it was reasonable for an insurance plan to rely on actuarial probabilities and terminate benefits at age 65 rather than continuing payments for life. The worker himself had not demonstrated that he would have worked after age 65 or had any expectation of being employed after age 65, and in fact did not work after age 65.

Although the worker was not disadvantaged himself based on age, the majority went on to consider the comparator group as a whole. It noted that almost all workers injured after age 61 return to work, meaning most are not disadvantaged by the two-year statutory limit. Further, a two-year limit takes into account the life circumstances of those persons in their sixties, as opposed to those in their twenties. Workers at age 65 are eligible for other sources of income, such as CPP. Viewed contextually, the majority found the two-year limit does not perpetuate prejudice of workers aged 63 and older. Even if s.43(1)(c) did violate section 15 of the Charter, it constituted a reasonable limit under section 1 of the Charter.

In his dissent, the Vice-Chair found that the workplace insurance scheme was both an insurance scheme for employers and a social benefits program for workers. He found that s.43(1)(c) was discriminatory as it failed to consider the disadvantaged position of older workers, and limited their entitlement to benefits they might be entitled to if they had been younger. The Vice-Chair found that s.43(1)(c) was not saved under section 1 of the Charter. The Vice-Chair would have allowed the worker LOE benefits until age 71.

The worker commenced an application for judicial review. After the Tribunal filed its Record, counsel for the worker attempted to submit new evidence for the judicial review. As the respondents objected, counsel for the worker then attempted to commence an application to reconsider *Decision No. 512/06*, while the judicial review was still pending. As the respondents objected to this approach as well, the worker decided to withdraw the judicial review and pursue a further reconsideration at the Tribunal. The respondents consented to the withdrawal, though the Tribunal insisted on payment of costs incurred from producing the Record.

The worker is now pursuing a request for reconsideration. Since the original Tribunal Vice-Chair has passed away, a new Vice-Chair will need to be assigned to hear the reconsideration.

6. *Decisions Nos. 1110/06* (November 2, 2006), *1565/08I* (July 25, 2008), *1565/08* (May 13, 2010), and *1565/08R* (February 9, 2011)

The worker injured his back at work in June 1990. He was granted temporary benefits and an 18% NEL. He was granted a FEL sustainability award at D1 in 1992. He was also granted a FEL supplement while he participated in a VR program. He was undergoing a retraining program to become a civil engineering technician when he was involved in a motor vehicle accident in 1993, forcing him to quit the program.

At R1, in 1994, the worker was granted a FEL based on earnings which assumed he had been able to complete the training program.

In 1997, the Board ruled that the worker had recovered from the 1990 accident and his ongoing back problems were actually the result of a pre-existing back condition. The worker's entitlement was revoked retroactive to September 1990.

The worker appealed to the Tribunal.

In *Decision No. 1110/06*, the Tribunal determined the worker's pre-existing condition had been asymptomatic at the time of the 1990 injury, so the work injury was a significant factor contributing to the worker's ongoing impairment. The Panel held the worker had ongoing entitlement, that he had a permanent impairment, and that the entitlement to benefits he had at the time of the 1997 Board decision should be restored. The Board was directed to reinstate the worker's benefits and determine his past and ongoing benefits.

Following *Decision No. 1110/06*, in 2007, the Board made a new FEL determination. The Board found the worker was only partially disabled because of his work injury, and his inability to work was due to the 1993 motor vehicle accident. The Board reinstated the NEL, but did not grant a full FEL. The Board awarded a smaller FEL starting in 1993 as it determined he could have worked as a civil engineering technician but for the non-compensable motor vehicle accident. The worker appealed to the Tribunal again.

In *Decision No. 1565/08I*, the Panel spent the first day of hearing considering the role of a person who appeared at the hearing with the worker and who characterized herself as a "facilitator." Following a lengthy discussion, it was decided that this person would characterize herself as a "friend" of the worker. As a friend, she would qualify under the exemption for a representative as set out in By-Law 4 passed pursuant to the *Law Society Act*. However the Panel brought the circumstances of the case to the attention of the Tribunal Chair.

When the hearing reconvened, the Panel considered the worker's arguments that he was totally disabled before his motor vehicle accident, and hence he was entitled to a full FEL.

In *Decision No. 1565/08*, the Panel found the worker was not totally disabled before the motor vehicle accident. Further, the motor vehicle accident had a significant impact on the worker. The Panel found that the worker's inability to earn beyond the level determined by the Board was because of the motor vehicle accident. As a result, the Panel upheld the worker's D1 and R1 FEL award as determined by the Board.

However, at the R2 date, the Board had found the worker would have been able to earn the average earnings of a fully qualified civil engineering technician, and hence have a lower FEL. The Panel allowed the worker's appeal in part on that issue, finding he would only have been able to make entry level earnings. Thus the worker was entitled to a partial FEL commencing in 1993. The Panel also confirmed the Board's NEL determination.

In *Decision No. 1565/08R*, a different Vice-Chair denied the worker's application to reconsider *Decision No. 1565/08*, finding the threshold to reconsider had not been met.

The worker commenced an application for judicial review of *Decisions Nos. 1565/08* and *1565/08R*. The worker is self-represented. The Notice of Application for Judicial review

contains a myriad of allegations of breaches of natural justice, bias, and decisions made on no evidence. The Notice of Application also alleges that the second Panel was barred from making certain findings in light of the conclusions in the earlier decision, *Decision No. 1110/06*.

In light of the allegations in the Notice of Application and pursuant to its usual practice, the Tribunal asked the worker to order the transcripts of the Tribunal hearings for the Record of Proceedings. The worker refused. The Tribunal ordered the transcripts itself, and filed a Record of Proceedings which included the transcripts.

The worker brought a motion for an order to remove the transcripts from the Record, and to remove many of the materials pertaining to *Decision No. 1110/06*. The motion was heard in September 2011 by Madam Justice Swinton. The Tribunal filed a factum for use on the motion.

Following oral argument by the worker and Tribunal Counsel, Justice Swinton dismissed the worker's motion, accepting the Tribunal's arguments that, in the light of the allegations contained in the Notice of Application, the transcripts and materials from the prior appeal are properly included in the Record of Proceedings. Costs in the cause were awarded to the Tribunal.

The Divisional Court Registrar later dismissed the worker's judicial review because he failed to file his factum and perfect his application within a year of filing the judicial review. The worker brought a motion to set aside Registrar's dismissal and to extend the time to file his factum. The Tribunal did not consent to the motion, but also did not oppose it. On June 20, 2012, the motion was granted.

The worker delivered his factum in July 2012. The Tribunal delivered its factum in August 2012. The hearing of the judicial review was scheduled for December 2012, but was adjourned at the request of the worker's counsel, who had recently been retained by the worker to attend for the hearing of the application. A new date has not yet been set for the hearing.

7. *Decisions Nos. 10/04* (May 19, 2004), *10/04R* (December 29, 2004), *10/04R2* (September 7, 2005), and *10/04R3* (January 10, 2012)

The worker was injured in July 1986. He was paid total disability benefits until he returned to work in December 1986. In December 1987, he claimed he suffered a new injury. He was paid total disability benefits until May 1989, when he was granted a 7% permanent disability pension. He was paid a s.147(4) supplement from November 1989 until November 1991, when the Board terminated the supplement.

He was (following an appeal to WSIAT and the release of *Decision No. 1546/00*) granted a s.147(2) supplement from November 1991 until March 1995. The Board sponsored the worker to attend university from 1995 to 1998, during which time he received s.147(2) benefits.

By 2000, the worker's pension had increased to 15%.

The worker asked the Board for s.147(2) benefits from November 1989 to November 1991. The Appeals Resolution Officer (ARO) denied the appeal for s.147(2) benefits on

the basis that the worker was not involved in Board-approved VR activities between 1989 and 1991.

In another ARO decision, the worker was denied s.147(4)(b) benefits after August 9, 1998.

The worker appealed to WSIAT, seeking:

- a s.147(2) supplement from November 1, 1989 to November 1, 1991,
- a s.147(4) supplement after August 9, 1998, and
- a finding that he sustained a new accident in December 1987, rather than a recurrence of the 1986 injury.

At the worker's request, his appeal was considered as a written case.

In *Decision No. 10/04*, the Vice-Chair held:

- the worker was entitled to a s.147(2) supplement rather than a s.147(4) supplement from November 1, 1989 to November 1, 1991,
- the worker was not entitled to a s.147(4) supplement after August 9, 1998, and
- the December 23, 1987 incident was a recurrence.

In regards to the period from November 1989 to November 1991, the Vice-Chair found that the Board had been in error in characterizing the s.147(4) benefits granted during this time as a "temporary" supplement, given the mandatory language contained in s.147(7). However, the Vice-Chair found that the Board's initial decision to award the s.147(4) benefit was in error because during that period, the worker was participating in a VR program; therefore, as of that date he should have been awarded a s.147(2) supplement rather than a s.147(4) supplement.

In regards to s.147(4) benefits after August 9, 1998, the Vice-Chair noted that the worker had already completed a VR program and had an earning *capacity* (as opposed to his actual earnings) that approximated his pre-accident earning capacity under s.147(2). Consequently the worker was not entitled to a s.147(4) supplement after August 1998.

The worker asked the Tribunal to reconsider *Decision No. 10/04* on the grounds that the Tribunal had no authority to terminate a s.147(4) supplement, that in regard to the period after August 1998 the Tribunal had failed to consider the increase in the worker's permanent pension, and that the December 23, 1987 accident was a new accident, rather than a recurrence.

The Vice-Chair denied the reconsideration. He found the worker should never have received a s.147(4) supplement in the first place, because the evidence demonstrated that as of 1989, the worker would have benefitted from VR. Accordingly, he should have received a s.147(2) supplement, which was what the Vice-Chair had granted. A worker cannot receive both a s.147(2) and a 147(4) supplement at the same time. The Vice-Chair held the Tribunal has jurisdiction to determine eligibility for a s.147(4) supplement, though it may not be rescinded once entitlement is established.

The Vice-Chair also found the increase in the worker's pension was taken into account in the original decision, and that the December 1987 accident was a recurrence rather than a new accident.

The worker's application for a second reconsideration was denied by the same Vice-Chair in *Decision No. 10/04R2*. In regards to the period from November 1989 to

November 1991, the Vice-Chair confirmed that the Tribunal may find that s.147(4) benefits can be rescinded where they should never have been granted. Here the worker was entitled to s.147(2) benefits because he could have benefitted from VR services.

The worker's applications for six further reconsiderations were denied by the Tribunal Chair. The worker retained counsel and commenced a ninth reconsideration application. Submissions made on behalf of the worker alleged a breach of procedural fairness, in that the original Vice-Chair did not notify the worker that his s.147 (4) benefits for the period November 1989 to November 1991 were at risk in the appeal.

In *Decision No. 10/04R3*, the new Vice-Chair denied the application for reconsideration. In his reasons, the Vice-Chair stipulated that he was only considering the procedural fairness arguments, which had not been raised in prior reconsideration applications. These were:

- whether the Vice-Chair committed a procedural error in not giving the worker notice that his initial entitlement to section 147(4) benefits would be an issue under consideration;
- whether the Vice-Chair committed a procedural error in not advising the worker of the downside risk arising from his request for section 147(2) benefits from November 1, 1989 to November 1, 1991; and
- if either of these errors did exist, whether correcting them would likely produce a different result.

In regards to notice, the Vice-Chair acknowledged that initial entitlement to s.147(4) benefits was not identified in the list of issues in *Decision No. 10/04*, and the worker and employer were not given an opportunity to provide submissions on this issue. However, the parties were made aware that s.147 was in issue, and that should have been sufficient to put the parties on notice that the interplay between the different parts of s.147 were within the scope of the appeal. Section 147 is a comprehensive scheme of supplementary benefits for a permanent impairment, and its provisions cannot be read on a compartmentalized basis. Where a worker has claimed s.147(2) benefits, it is not reasonable to argue that the Tribunal is precluded from considering s.147(4) benefits for the same period. In any event the notice question is no longer relevant as the worker had received two detailed reconsideration decisions.

In regards to downside risk, the Vice-Chair held there was no downside risk for the worker when he claimed s.147(2) benefits for the period November 1989 to November 1991. He noted that the original Vice-Chair did not remove the Applicant's entitlement to s.147 supplementary benefits for the period of November 1, 1989 to November 1, 1991. Rather, he simply found that the Applicant was entitled to those benefits on the basis of s.147(2) and not s.147(4). Not only was the worker's appeal on the issue granted, his benefits were increased for that period. It was not reasonable to characterize this result as a downside risk.

Following the release of this decision, the worker commenced an application for judicial review. The worker is self-represented. He has filed a factum, and the Tribunal has filed its factum. As of the end of the quarter, the Tribunal had been verbally advised that the judicial review will be heard in June 2013.

8. *Decisions Nos. 834/09* (August 5, 2010) and *834/09R* (April 15, 2011)

In this right to sue application, the applicants sought determinations as to whether the rights of action of Ms. M and Ms. R were taken away by the Act. Both Ms. M and Ms. R suffered serious injuries in a motor vehicle accident that occurred on November 18, 2005 when their van, driven by Ms. M, spun out while they were travelling on a highway. After the van came to rest, both Ms. M and Ms. R exited the van. While they were at the rear of the van, another driver, Mr. K, lost control his van near the same location as where Ms. M had lost control of the van she was driving. Both Ms. M and Ms. R were struck by K's van, and suffered severe injuries including the amputation of one leg each.
Ms. M was scheduled to work the morning of the accident. She attended the offices of A (the company) and delivered flowers to a synagogue. She loaded up the van with items to be delivered to a banquet hall for the next day's event.

Ms. R was not scheduled to work the day of the accident. She attended at A, the company's office, in the morning to collect her pay cheque. She intended to then meet her mother for lunch. Ms. M offered to drive Ms. R to the restaurant. They left the company's offices together in the van. After leaving the office, they stopped at the company's storage facility, where they loaded additional items for an upcoming event. The accident happened some time after leaving the storage facility.

Ms. M, Ms. R and their family members brought actions against various individuals and entities. The right to sue application was brought by the sole proprietor of the company, and the company from whom the van was leased, with a co-application brought by Mr. K and his company and the owner of his van, and the company which maintained the highway.

A, the company, was not registered with the Board at the time of the accident.

At issue in the application was whether A was a Schedule 1 employer; whether Ms. M and Ms. R were workers or independent contractors and whether they were in the course of their employment at the time of the accident; whether Mr. K was acting in the course of his employment at the time of the accident; and whether, if the actions of Ms. M and/or Ms R were taken away, the *Family Law Act* (FLA) claims were also taken away by the WSIA.

The Vice-Chair found that it was not necessary to decide A's classification, but rather whether A, a party décor business, was a Schedule 1 employer at the time of the accident. She found that while the words "party décor" are not specifically included in Schedule 1, the various components that make up party décor are found in Schedule 1. She found that A was compulsorily covered under Schedule 1.

The Vice-Chair found that both Ms. M and Ms. R were workers of A at the time of the accident. However, she found that Ms. M was in the course of her employment at the time of the accident, while Ms. R was not. She further found that Mr. K was in the course of his employment at the time of the accident.

The Vice-Chair concluded that Ms. R's action and that of her FLA claimants was not taken away by the WSIA. However, she found that Ms. M's action against the sole proprietor, Mr. K, Mr. K's employer, and the company which maintained the highway was taken away by the WSIA. The right of action of the FLA claimants in Ms. M's action was not taken away by the WSIA.

The Vice-Chair made no determination with respect to rights of action against the highway and the Ontario Ministry, as they did not participate in the application.

Both Ms. M and the applicants made requests for reconsideration of the decision. The reconsideration requests were denied.

Ms. M then commenced an application for judicial review, seeking a declaration that, at the time of the accident:

(i) A was not a Schedule I employer;
(ii) Ms. M was not a "worker" as defined by the WSIA; and
(iii) Ms. M was not in the course of her employment.

The Tribunal sent several follow-up requests to the Applicant's counsel to provide transcripts so that the Tribunal could prepare and file the Record of Proceedings. The Applicant's counsel failed to respond and ultimately the Tribunal filed the Record without the transcript. The Applicant's counsel then filed the transcripts separately.

The Applicant's counsel delivered a factum in December 2012. At the end of the quarter, the Tribunal was in the process of preparing its factum.

9. *Decisions Nos. 1093/11* (July 25, 2011) and *1093/11R* (December 13, 2011)

The worker injured his back in 1986. He injured his shoulder in 1993. Tribunal *Decision No. 1022/02R3* found the worker was entitled to benefits for his shoulder on a disablement basis. The Board then granted entitlement to a LMR assessment to identify an appropriate suitable employment or business (SEB). An ARO decision found the SEB was a retail trade manager, and based the worker's temporary disability benefits and his FEL on deemed mid-entry wages for this SEB. The worker appealed to the Tribunal, alleging the SEB was not suitable, and the deemed wages were too high.

The worker's appeal was denied. The Vice-Chair found that the SEB of retail trade manager was appropriate because it included the job the worker had been doing since 2000. The worker was operating his own small store. This employment was suitable given the worker's restrictions and his vocational background.

The Vice-Chair also found that the deemed wages were suitable. Even though benefits are usually calculated based on actual wages, since the worker was self-employed the actual earnings did not reflect his actual wages. The worker lived above his store in Quebec, and used the store's vehicle and food. He paid his spouse a salary. The Vice-Chair also found it was appropriate to use the Ontario-based wage calculation even though the worker now resided in Quebec.

The worker's application for reconsideration was denied. The worker argued the Vice-Chair was biased towards the worker because she questioned the accuracy of the worker's tax returns, and that the Vice-Chair failed to consider factors that would suggest the earning capacity should have been based on higher wages. The Vice-Chair found that there was no reasonable apprehension of bias, as she had not suggested the Applicant cheated on his tax returns as the worker alleged. *Decision No. 1093/11* relied on Tribunal jurisprudence in calculating appropriate earnings for self-employed workers, and this does not demonstrate bias. Further, the Vice-Chair pointed out that she had found the Board's calculation, which was based on average rather than high-end wages, was appropriate.

In June 2012, the Applicant commenced an Application for judicial review. The Tribunal has filed a Record of Proceedings and is waiting to receive the Applicant's factum.

10. *Decision No. 2410/11* (April 13, 2012)

A plaintiff was struck by a pickup truck that was clearing snow in her employer's lot. The truck was driven by GB and owned by FB. She commenced an action against GB and FB, who were brothers involved in the snow-clearing business. She also sued D, the company that leased the truck to them. The leasing company applied to the Tribunal for an order taking away the right of action against the brothers. The Vice-Chair held that the right of action was not taken away against any of the defendants.

A representative for the plaintiff's employer attended the hearing as an observer. Following the hearing, the representative contacted the Tribunal and supplied a copy of the snow-removal contract. Neither the plaintiff nor respondent objected, so the contract was admitted and relied upon by the Vice-Chair in her decision.

The issues were whether the plaintiff was in the course of her employment at the time of the accident, whether s.28(4) of the WSIA took away the right of action against all defendants, and whether GB was a worker in the course of employment.

The Vice-Chair considered the contract which had been admitted after the hearing, and concluded that the employer owned the parking lot and controlled its maintenance. The Vice-Chair referred to prior Tribunal decisions which have generally held that a worker is found to be in the course of employment if they were in an employer-controlled parking lot while coming to work, as this is reasonably incidental to employment. She held the plaintiff was in the course of her employment when she was injured.

However, section 28(4) of the WSIA provides that a right of action is not taken away if any employer, other than the worker's employer, supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers. Here, the snow-removal truck was rented; and D, the leasing company, did not provide workers; so the plaintiff's right to sue was not taken away against D. The issue was whether the right of action was taken away against GB and FB, neither of whom participated in the hearing.

The Vice-Chair followed previous Tribunal decisions which have held that the s.28(4) exemption only applies to the employer who supplied the vehicle without also supplying workers; that is, the employer who supplied the vehicle without also supplying workers is the only entity against whom the action may proceed. Other employers and workers are still protected from suit. "The removal of the right to sue applies to employers who had workers in the course of employment at the time of the accident, but not to employers who do not have that essential compensation nexus."

However, the Vice-Chair found on the evidence, including the contract that was submitted after the hearing, that because GB was an owner and was driving the truck at the time of the accident, GB and FB were not workers acting in the course of their employment. Hence the right of action was also not taken away against GB and FB.

D, the rental company, has commenced an application for judicial review of *Decision No. 2410/11*. The Applicant is amending its materials to include the Tribunal as a named party, following which the Tribunal will file its Record of Proceedings.

Recent Decisions

Laryngeal cancer and factors to consider in occupational disease claims

Decision No. 1859/12 allowed the worker's appeal for benefits for laryngeal cancer as arising from his employment in a gold mine. In its reasons, the decision reviewed prior Tribunal and other jurisprudence on the question of the determination of causation in occupational disease cases.

The Panel noted the principle enunciated in *Rothwell v. Raes*, 2 O.R. (3d) 332 (Ont. C.A.), that the onus of proof is not met by demonstrating a possibility of some causal connection. The Panel however, also noted the benefit of doubt provisions found in the WSIA.

The Panel set out the five factors which the Tribunal considers in determining causation in occupational disease claims: 1. the latency period between initial exposure to a potentially harmful substance, and the onset of the condition; 2. the intensity of the worker's exposure to a potentially harmful substance; 3. the involvement in the worker's condition of non-occupational factors; 4. physiological signs consistent with any proposed causal relationships; 5. the presence of predictive factors consistent with the suggested causal factors.

CAD-7 cost relief, the application of the *Highway Traffic Act*, and actions of the Board

Decision No. 2407/11 considered whether a backhoe fell under the definition of "motor vehicle" under the *Highway Traffic Act* in the context of an employer's claim for relief from the costs of a claim. The employer was also seeking a retroactive adjustment to its CAD-7 experience rating account.

In this case, a worker was struck by a backhoe operated by a homeowner who was not covered under WSIA. Board policy (*Operational Policy Manual* (OPM) Document No. 15-01-06) provides that, in motor vehicle accident claims, the Board conducts an investigation and if third party negligence is determined, the Board removes any benefits paid to the worker from the accident employer's cost record according to the degree of negligence attributed to the third party.

OPM Document No. 15-01-06 refers to both "motor vehicle accident" and "automobile insurance." The Vice-Chair found that, as the Board's policy resulted from the no-fault provisions found in Part VI of the *Insurance Act*, the terms "motor vehicle" and "automobile" should be given the same meaning that is given to the term "automobile" in that Part of the *Insurance Act*.

The Vice-Chair reviewed the *Insurance Act*, as well as the definition of "motor vehicle" under the *Highway Traffic Act*, finding that "backhoes" did not fall under the definition of "motor vehicle." This conclusion was supported by court decisions on this question, such as *Morton v. Rabito*, (1998) 42 O.R. (3d) 161 (Ont. C.A.). Since the "backhoe" in this case was not a "motor vehicle," the employer was not entitled to relief from the costs the claim, as provided under the Board policy.

This decision is also of interest because it discussed whether CAD-7 cost relief is available where Board negligence is alleged, as well as the Tribunal's jurisdiction in situations where new legal and policy arguments are raised in the appeal.

Transfer of costs and the Occupational Health and Safety Act

Decision No. 607/12 found that a contractor should assume 100% of the costs of a claim. In this case, the worker was injured while drilling holes in a sewer pipe located in a small trench, when the dirt in the trench shifted suddenly, and crushed the worker's knees against his drill stand. The Panel in this case found that the contractor had not complied with the provisions of the *Occupational Health and Safety Act* (OHSA).

Section 23 of the OHSA provides that a constructor shall ensure that measures and procedures prescribed by the Act are carried out, that work performed is in compliance with the Act and that the health and safety of workers are protected. Section 234 of the Regulations of the OHSA (Ontario Reg. 213/91) imposes certain health and safety requirements for excavations.

Although the regulations were not applicable in this particular case, the Panel nonetheless found that s.23 of the OHSA created an over-arching obligation on contractors to ensure the health and safety of workers on a project. Also s.25 of the OHSA provides that an employer should take every reasonable precaution in the circumstances for the protection of a worker.

The contractor was not relieved of this obligation because the injured worker took control of the site when he requested a pump and several loads of gravel to ameliorate the water levels in the trench. The Panel referred to s.23 of the regulation which requires that every excavation must be kept "reasonably free of water." Since the contractor had been made aware by the worker that there was water in the trench, steps should have been taken to protect the worker from the accident that occurred.

Entitlement to LOE benefits during a strike, and the application of Board policy

Decision No. 1878/12 considered entitlement to LOE benefits for periods when there is a strike. The decision discussed both the provisions under WSIA and Board policy, namely OPM Document No. 15-06-05.

The Vice Chair in this case noted that the Board policy must be read in light of s.43 of the WSIA. LOE benefits are only payable when a wage loss results from the compensable injury. The policy addresses a number of fact situations that may be likely to reflect the fact that there is a compensable loss of earnings. The policy sets out a "general" rule (that generally benefit status is not affected by a strike or lockout), but recognizes exceptions that may "suggest" a contrary finding. The discretionary language recognizes that it is necessary to consider the specific facts of each situation and whether there is a compensable loss of earnings.

The Vice-Chair found none of the exceptions set out in the policy were applicable to the facts in the case because the strike was brief, the worker expected it to resolve and she neither looked for work nor intended to look for work.

Territorial reach of the Tribunal's jurisdiction in right to sue applications

Decision No. 626/11 addressed the Tribunal's jurisdiction with respect to a civil action involving a defendant company that was not resident in Ontario.

In this case, a truck driver was picking up a load from an American company in Michigan where the accident occurred. The worker originally made a claim for benefits from the WSIB but later withdrew his claim, and repaid the benefits he received. He then made a Statutory Accident

Benefits (SAB) claim and commenced an action against the company in the United States. Afterward, he settled the action without obtaining prior approval of the settlement from the Board. The worker subsequently claimed benefits at the Board at which time his claim was refused. The Board denied benefits because the worker agreed to a settlement without prior Board approval under s.30(14) of the WSIA.

The SAB's insurer was seeking a determination that the worker's right of action against the defendant was taken away under the WSIA.

The Vice-Chair noted that the territorial reach of the WSIA did not extend to an American corporation and its employees at a U.S. plant in respect of an accident in the U.S., such that they were immune from suit in Ontario. Furthermore, if the company was a Schedule 1 employer in this case, this would mean that its employees would be workers under Schedule 1 with potential claims to benefits to the WSIB. This would raise concerns with extending the reach of an Ontario statute beyond its borders in terms of the entitlement to benefits of non-Ontario workers and premiums paid by their non-Ontario employers to the WSIB.

The Vice-Chair noted that the Tribunal had jurisdiction to make a determination under s.31(1)(c) of the WSIA whether the worker was entitled to claim compensation benefits under the Act. The Vice-Chair found, however, that the Tribunal did not have jurisdiction with respect to the issue arising from s.30(14) of the WSIA, because s.123(2) of the WSIA specifically excludes from the Tribunal's jurisdiction, any determination with respect to elections under s.30 of the WSIA.

WSIAT
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